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No. 76-1664

In the Supreme Court of the United States

OCTOBER TERM, 1977

FELIPE GAMA-GARCIA,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, Felipe Gama-Garcia, prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above-case, which found him deportable as having obtained a visa based on a "sham marriage."

JUDGMENT AND OPINION OF THE COURT BELOW

Appeal was taken to the United States Court of Appeals for the Seventh Circuit from the entry of an

Order by the Board of Immigration Appeals in favor of the Respondent, approving the determination of the Special Inquiry Officer.

On the appeal, the Petitioner urged that the Respondent had not sustained its burden of proof by "clear, convincing and unequivocal evidence." The Court of Appeals' in the said decision of April 7, 1977 rejected the Petitioner's claim.

The opinion of April 7, 1977 is an unpublished order not to be cited per Circuit Rule 35.

JURISDICTION

The Order of the United States Court of Appeals for the Seventh Circuit affirming the decision of the Board of Immigration Appeals and rejecting Petitioner's claim was filed on April 7, 1977. This petition is filed within 90 days of that Order. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

1. Did the Court of Appeals err by reducing the burden of proof from "clear, convincing and unequivocal evidence" as required by the Supreme Court in *Woodby* v. *INS*, 385 U.S. 276 (1966) to reasonable, substantial and probative?

STATUTES INVOLVED

Section 241(a)(1) (8 U.S.C. 1251(a)(1)), Section 212 (a)(14) (8 U.S.C. 1182(a)(14), and Section 212(c) (8 U.S.C. 1182(c) of the Immigration and Nationality Act.

STATEMENT OF THE CASE

This case involved an appeal from the decisions of the Special Inquiry Officer, the Board of Immigration Appeals and the United States Court of Appeals for the Seventh Circuit in favor of the Respondent, upholding an order by the Respondent to deport the Petitioner from the United States. This petition prays the Court to issue its Writ to review the record which it is urged is not supported by "clear, convincing and unequivocal evidence."

STATEMENT OF FACT

Petitioner, Felipe Gama-Garcia, is a native and citizen of Mexico who last entered the United States in possession of an immigrant visa. He claimed to be exempt from the labor certification requirement by reason of marriage to a United States citizen. Based on this representation, he was admitted as an immigrant at Detroit, Michigan on August 19, 1970 as an immediate relative. On April 19, 1973, the Petitioner was served with an Order To Show Cause charging him with being deportable, which Order To Show Cause was based essentially on charges that the marriage he entered into was a "sham." Subsequently, on or about July 10, 1973 a deportation hearing was commenced before an Immigration Judge. The record of the hearing consists of 282 pages of transcript, together with 25 exhibits. At the first hearing the Petitioner, through his then attorney, denied the substantive charges of deportability. The capsulized testimony of the government's witness in chief, the ex-wife of the Petitioner, was that the marriage she entered into with the Petitioner was on her part a sham. At a hearing on February 26, 1974 the government clearly indicated it had no further evidence on the question of deportability; however, at

another hearing on April 11, 1974, the Immigration Judge permitted the government to present an alleged corroborating witness.

The Petitioner herein in his testimony essentially denied the allegation that his marriage to Lydia Colon was a sham. He also testified that he has been in the United States since 1965 save for his trip to Canada to obtain his immigrant visa. The Petitioner presented a witness to corroborate his testimony that he did in fact live with Lydia Colon.

Lydia Colon, by her own admission, admitted that she had been addicted to the use of heroin. She also admitted that she had an arrest record relating to narcotic offenses.

Petitioner was granted the privilege of voluntary departure by the Immigration Judge. The Immigration Jdge, in a twenty page decision decided that the Petitioner was amenable to deportation on all of the charges. A timely appeal was taken to the Board of Immigration Appeals, who sustained the decision of the Immigration Judge in a three page decision.

On June 1, 1976 the Petitioner herein filed a Motion To Reopen and Reconsider the Board of Immigration Appeals' decision, which Motion is presently pending before the Board of Immigration Appeals.

A Petition for Review was filed in the United States Court of Appeals for the Seventh Circuit under the provisions of Section 106 of the Immigration and Nationality Act (8 U.S.C. 1105(a)).

REASONS FOR GRANTING THE WRIT

This Court should exercise its jurisdiction in this case for the following reasons.

1. The decision of the United States Court of Appeals for the Seventh Circuit citing *Woodby* v. *INS*, 385 U.S. 276 (1966) lessened the burden of proof that the Supreme Court had enumerated in said case by lowering the burden of proof from "clear, convincing and unequivocal evidence" to reasonable, substantial and probative evidence. Had a higher standard of proof been adherred to by the Court of Appeals the record would not sustain an Order of Deportation.

2. The Petitioner herein has filed with the Board of Immigration appeals a Motion to Reopen his deportation proceeding which was filed with the Board of Appeals in May, 1976 and is presently pending unadjudicated based on the fact that in *Francis* v. *INS*, 532 F.2d 268 (2 Cir. 1976), the Petitioner herein is eligible for the benefits of Section 212(c) of the Immigration and Nationality Act (8 U.S.C. 1182(c)).

3. Jimmy Carter, the President of the United States is presently contemplating, as published in the media, an amnesty for aliens who have been in the United States such as the Respondent and to remove the Respondent from the United States at this point in time would be cruel and unusual punishment.

CONCLUSION

Wherefore, for the above and foregoing reasons, we respectfully submit that a Writ of Certiorari issue to the United States Court of Appeals for the Seventh Circuit to review the decision of that Court rejecting this Petitioner's application for adjustment of status.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Unpublished Order Not To Be Cited Per Circuit Rule 35
(Submitted April 1, 1977)

April 7, 1977

Before

Hon. WILBUR F. PELL, JR., Circuit Judge

Hon. ROBERT A. SPRECHER, Circuit Judge

Hon. PHILIP W. TONE, Circuit Judge

No. 76-1691

FELIPE GAMA-GARCIA,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the Immigration and Naturalization Service.

This matter comes before the court on the filing of briefs by the parties and on the motion of the appellee for affirmance without oral argument pursuant to Circuit Rule 15. On consideration whereof, We GRANT the motion and AFFIRM the order of the district court.

Gama-Garcia, a native and citizen of Mexico, was admitted to this country in 1970 as a permanent resident

on the basis of his marriage to a United States citizen. On April 19, 1973, petitioner was served with an Order to Show Cause charging him with being deportable because the marriage he had entered into was a "sham." At the conclusion of a lengthy deportation hearing, the immigration judge rendered a twenty page decision, which found petitioner deportable under 8 U.S.C. § 1251 (a)(1). In effect, since petitioner's marriage was fraudulent, he was found to have entered this country illegally without the benefit of a valid visa and labor certification. Petitioner was granted a voluntary departure in lieu of a deportation order. Petitioner is seeking judicial review pursuant to 8 U.S.C. § 1105(a) of the March 17, 1976, order of the Board of Immigration Appeals, sustaining the immigration judge's order.

The inquiry of this Court in this appeal is limited to whether or not the findings of the immigration judge are supported by reasonable, substantial, and probative evidence on the record considered as a whole. Woodby v. Immigration & Naturalization Service, 385 U.S. 276 (1966). We can not ignore or substitute our own factual determinations for the reasonable findings of the administrative authorities. *Id.* at 284.

At the deportation hearing Lydia Colon, the woman who married the petitioner, testified that she was paid $400 to enter into the marriage and that she never intended to live with him nor did she ever live with him. This evidence was supported by another witness who was a good friend of Ms. Colon and who had also participated in a fraudulent marriage on the same day. Petitioner's counsel attempted to discredit Ms. Colon by pointing out her criminal record, her drug history, and

her claimed loss of memory at an earlier proceeding. Petitioner testified on his own behalf claiming that he had cohabited with Ms. Colon subsequent to their marriage and the reason that they did not move in together permanently was that Ms. Colon was receiving public assistance benefits which she would lose if she were found living with a man. One corroborating witness and two witnesses attesting to his credibility were called.

In his decision the immigration judge stated:

> In the final analysis the issue here is one of credibility. . . . Having had the opportunity of observing the respondent's demeanor and his manner of testifying, I find his testimony to be lacking in credibility and unworthy of belief. On the other hand, Lydia Colon's testimony was direct, forward, and unhesitant. . . . I find her testimony credible. (Admin. Record at 33)

Although noting that Ms. Colon was not a "paragon of virtue," the judge also found that she would have no incentive to testify falsely as she was terminally ill with cancer. The judge's reasonable findings as to credibility are substantiated by the record and cannot be disturbed by this Court. *Lattig* v. *Pilliod,* 289 F.2d 478, 480 (7th Cir. 1961). Moreover, an independent review of the record as a whole indicated that it contains "evidence that has relevant probative force and which a reasonable mind might accept as adequate to support a conclusion" that the marriage was a sham. *Id.* at 479.

Petitioner's suggestion that this Court should set aside the judge's order because federal courts should not dictate rules about the kind of life which marital partners

may choose to lead is not applicable in this factual setting. Cf. Bark v. Immigration and Naturalization, 511 F.2d 1200 (9th Cir. 1975). In the instant case, there is substantial evidence that the marriage was a sham at its inception. Consequently, any subsequent "irregularities" in their "marital" relationship are irrelevant to this decision.

Petitioner's other arguments are also without merit.

It Is Ordered that the appellee's motion to affirm without argument be GRANTED and the order of the Board of Immigration Appeals is AFFIRMED.